put these so-called subrogation cases on the shelf as relics of a past stage of the law."

We agree that while the law of partnership in the United States is in its present state of flux it would be a great mistake to attempt to codify it in the usual fashion, since that would produce a result even worse than the "crystallized chaos" of the English partnership act — worse because we have not only copied most of England's false conceptions as to the nature of the partnership relation, but also because of the muddling effect of the view of partnership real estate which is taken by the courts of the United States.

But we are not optimistic as to the probability of a general and open judicial recognition of the firm as a legal person within any reasonable time. It has taken over two hundred years to bring the courts to an occasional, hesitating and timorous, partial admission that the firm is an entity, an admission which from lack of courage they hasten to retract or qualify the next time the question comes before them. Mr. Cowles refers to the Supreme Judicial Court of Massachusetts as a court "specially strong in theoretical knowledge." That court has recently held that the title to the personal property of a partnership is not in the individual members. *Pratt* v. *McGuinness*, 173 Mass. 170. But the court shied at the word entity and said that the title is in the firm "as an entirety," which must mean the same thing, unless the court intended to create a tenure unknown to the common law, viz., an estate by entireties in personal property in analogy to estates by entireties in land granted to husband and wife. But the court could not have meant this, for the incidents of an estate by entirety are radically different from those of partnership tenure. It was this very court so "strong in theoretical knowledge," which perpetrated such decisions as *Howe* v. *Lawrence*, 9 Cush. 553, and *Bush* v. *Clark*, 127 Mass. 111. And the archaic doctrine of partnership as to third persons, when there is neither intent to form a partnership nor estoppel, seems to be still law in Massachusetts. See *Fitch* v. *Hamilton*, 13 Gray 468; *Pratt* v. *Langdon*, 97 Mass. 97, 100; *Brigham* v. *Clark*, 100 Mass. 130; *Potter* v. *Appleton*, 114 Mass. 114.

We have, however, no doubt that, unless arrested by unwise codification, the mercantile view of the nature of a partnership will eventually be adopted by all courts. In the meantime such articles as Mr. Cowles', and the assistance of like-minded lawyers, will be welcome aids to the opposition to the codification of this unripe branch of the law, and, if that cannot be averted, to an effort to make the codifying act a reformation and not a petrifaction. J. D. B.

BURDEN OF PROOF OF JUSTIFICATION. — The degree of proof required for a conviction for crime forms the subject of a recent reported address. *The Doctrine of Reasonable Doubt*, by J. S. Burger, 11 Am. Lawyer, 440 (Oct. 1903). The author's conclusions are, in the main, sound, but in one respect a better discrimination would at least have promoted clearness, and might have avoided what is believed to be an error. After examining the cases Mr. Burger decides that all the defenses which are set up by the defendant in a criminal proceeding under a plea of not guilty ought to be disproved by the prosecution beyond a reasonable doubt; and he classes together for this purpose insanity, *alibi*, self-defense, and absence of malice in murder. It is submitted that in so doing he fails to distinguish between negative and affirmative defenses.

Clearly the rule laid down is correct as to those defenses which are by nature negative; *e.g. alibi*, which is merely an argumentative denial of the *corpus delicti*; *Commonwealth* v. *Choate*, 105 Mass. 451; or insanity, which, by the better view at least, is of importance as disproving a necessary element in crime, the criminal intent. *People* v. *Egnor*, 67 N. E. Rep. 906 (N. Y.); *Davis* v. *United States*, 160 U. S. 469. *Contra*, *State* v. *Lawrence*, 57 Me. 574. It seems equally clear, however, that defenses by nature affirmative must be established by the defendant by a preponderance of evidence. This is undoubted, for example, where the plea is former jeopardy or pardon. *Commonwealth* v. *Daley*,

4 Gray (Mass.) 209. And it is submitted that, in general, circumstances of justification, as for example self-defense or public authority, are of this nature, though they are set up under not guilty. The mode of procedure may well be explained on the ground that criminal pleadings, unlike those in civil actions, have always been required to be made orally and by the defendant in person, a practice which obviously precludes accurate affirmative pleading. When the defendant on an indictment for criminal assault, for example, sets up a plea of self-defense, it would seem that he neither denies the criminal act, nor the criminal intent, (which seems to be nothing else than the intent to do the criminal act.) But this depends, of course, on the definition of the criminal act. Is it, broadly, the striking of the blows; or is it the striking of the blows under any but certain special circumstances? If the former view be correct, justification is an affirmative defense; if the latter, it is negative. It would seem that the former view is the more logical. And that it is correct is pretty conclusively shown by the fact that, while the universal rule is that an indictment must state all the essential elements of the crime, an averment is never required that the act was done without justification.

With reference to the rather indefinite "malice aforethought" which is one of the elements of murder, and which is not the same as mere criminal intent, a further discrimination is perhaps necessary. When the defendant shows that the killing was done in resisting an unlawful arrest or under provocation, this is held to disprove malice. These are therefore negative defenses, and unless the prosecution disproves them beyond a reasonable doubt, the defendant can be convicted of manslaughter only. *Maher* v. *People*, 10 Mich. 212. It would seem that proof of absolute justification on an indictment for murder would even more clearly disprove malice. See HOLMES, COM. LAW, 62. When, therefore, in such a case, the defendant offers evidence of justification for this purpose, it would seem proper to charge that if such evidence raises a reasonable doubt the defendant cannot be convicted of murder. But since malice aforethought is no part of the crime of manslaughter, as to manslaughter justification is only an affirmative defense, and the defendant must be convicted of the lesser crime unless his evidence establishes the justification by a fair preponderance.

It must be admitted that many decisions and perhaps the majority of text-writers support Mr. Burger's position. 2 BISH. CRIM. PR., 4th ed., § 599; MCCLAIN, CRIM. LAW, § 316; 25 AM. & ENG. ENCYC. LAW, 2nd ed., 283, and cases cited. But there are enough cases which reach the opposite conclusion to warrant the view here suggested. *State* v. *Ballou*, 20 R. I. 607; *Weaver* v. *State*, 24 Oh. St. 584.

NEW TRIALS FOR ERRONEOUS RULINGS ON EVIDENCE. — Should an erroneous ruling on evidence be *ipso facto* ground for a new trial? A recent article by Professor Wigmore, showing the great practical importance of a wise answer to this question, should be read by judge, lawyer, and layman. *New Trials for Erroneous Rulings upon Evidence; a Practical Problem for American Justice*, by John H. Wigmore, 3 Columbia L. Rev. 433 (Nov., 1903). By the original English rule, in criminal as well as in civil cases, "an erroneous admission or rejection of a piece of evidence was not sufficient ground for setting aside a verdict and ordering a new trial, unless upon all the evidence it appeared to the judges that the truth had thereby not been reached." But in 1835 the Court of Exchequer announced that an "error of ruling created *per se* for the excepting and defeated party a right to a new trial," and this doctrine persisted as the law in all English courts until modified in civil causes by the Procedure Act of 1875. It has, moreover, come to be supported by the majority of jurisdictions in the United States. Two theories are advanced in support of the doctrine: that "a party has a legal right to the judicial observance of the rules of evidence, *per se*"; that "the judicial consideration of the weight of all the evidence, as a motive for refusing a new trial, would be a